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Low Eng Yew v Chandra Sekaran a/l Murugesu

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02(IM)(NCVC)-172–01 OF 2015
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD ABRAHAM JJCA
21 MARCH 2016

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Civil Procedure — Striking out — Defence and counterclaim — High Court disallowed applications by plaintiff to strike out defence and counterclaim on ground of res judicata and to enter summary judgment — Whether matters pleaded in defence and counterclaim were finally decided by High Court in previous suit between parties — Whether applications for striking out and entry of summary judgment should have been allowed

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The appellant sought an order in the instant suit directing the respondent to specifically perform a share sale agreement under which the latter had agreed to sell to the appellant 55% of his shares in a company ('VW') for RM9m. The appellant paid the respondent RM7m and deposited the balance RM2m with stakeholders pending the completion by the respondent of his obligations under the agreement, which included his resigning as director of VW. The respondent subsequently filed an originating summons ('OS 407') contending that the appellant had breached the agreement by failing to pay him the balance RM2m for the shares and sought a declaration that since he had only received RM7m, the appellant was only entitled to 42.77% of the paid-up capital of VW. The High Court decided OS 407 in the appellant's favour ruling that the appellant had shown his readiness and willingness to complete the agreement by depositing the RM2m with stakeholders pending the completion by the respondent of all his obligations under the agreement; that there was also evidence to show the directors of VW, including the respondent, had passed a resolution approving the transfer of the shares to the appellant. In his defence and counterclaim in the present suit, the respondent sought, inter alia, a declaration that the appellant had breached the share sale agreement and, consequently, the agreement was terminated and the parties should be reverted to the position there were in before the agreement was executed. The appellant applied to strike out the defence and counterclaim on the ground the matters raised by the respondent had already been determined in OS 407. The appellant also applied for summary judgment on its claim. Both applications were dismissed by the High Court resulting in the instant appeal.

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Held, allowing the appeal, setting aside the decisions of the High Court and

allowing the appellant's application for summary judgment in respect of prayers (a) and (b):

(1) The appellant succeeded in his argument on the principle of res judicata. Comparing the statement of defence in the instant appeal to the issues that were dealt with by the High Court in OS 407, it was crystal clear that the same issues were litigated and decided in that suit. In the instant appeal, the court below had arrived at its findings without a critical analysis of the respondent's defence and the reasoning and findings of the High Court in OS 407 (see paras 14 and 23).

[Bahasa Malaysia summary

Perayu memohon untuk perintah dalam tindakan ini mengarahkan responden untuk melaksanakan perjanjian jualan saham di mana responden telah bersetuju untuk menjual kepada perayu 55% sahamnya di dalam syarikat ('VW') bagi sebanyak RM9 juta. Perayu membayar responden RM7 juta dan mendepositkan baki RM2 juta dengan pemegang-pemegang amanah harta sementara menunggu penyelesaian responden terhadap tanggungjawabnya di bawah perjanjian tersebut, termasuk peletakan jawatannya sebagai pengarah VW. Responden kemudiannya memfailkan saman pemula ('SP 407') dengan berhujah bahawa perayu telah memungkiri perjanjian apabila gagal untuk membayar kepadanya baki sebanyak RM2 juta bagi saham-saham dan memohon untuk perisytiharan bahawa memandangkan dia hanya menerima RM7 juta, perayu hanya berhak kepada 42.77% daripada modal berbayar VW. Mahkamah Tinggi memutuskan SP 407 memihak perayu dengan memerintah bahawa perayu telah menunjukkan kesediannya dan kesanggupannya untuk menyelesaikan perjanjian dengan mendepositkan RM2 juta tersebut dengan pemegang-pemegang amanah harta sementara menunggu penyelesaian responden terhadap kesemua tanggungjawabnya di bawah perjanjian; bahawa juga terdapat keterangan untuk menunjukkan pengarah-pengarah VW, termasuk responden, telah meluluskan resolusi membenarkan pemindahan saham-saham kepada perayu. Dalam pembelaan dan tuntutan balasnya dalam tindakan ini, responden memohon, antara lain, perisytiharan bahawa perayu telah memungkiri perjanjian jualan-saham dan, akibatnya, perjanjian tersebut ditamatkan dan pihak-pihak patut dikembalikan kepada kedudukan sebelum perjanjian dilaksanakan. Perayu memohon untuk membatalkan pembelaan dan tuntutan balas atas alasan perkara yang dibangkitkan oleh responden telah ditentukan dalam SP 407. Perayu juga memohon untuk penghakiman terus atas tuntutannya. Kedua-dua permohonan telah ditolak oleh Mahkamah Tinggi mengakibatkan rayuan ini.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membenarkan permohonan perayu bagi penghakiman terus berkaitan permohonan (a) dan (b):

(1) Perayu berjaya dalam hujahannya atas prinsip res judicata.

Memandingkan pernyataan pembelaan dalam rayuan ini kepada isu-isu yang dibicarakan oleh Mahkamah Tinggi dalam SP 407, adalah jelas bahawa isu-isu yang sama dilitigasikan dan diputuskan dalam tindakan tersebut. Dalam rayuan ini, mahkamah bawahan telah mencapai kepada dapatannya tanpa analisa kritikal terhadap pembelaan responden dan alasan dan dapatan Mahkamah Tinggi dalam SP 407 (lihat perenggan 14 & 23).]

Notes

For cases on defence and counterclaim, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8874–8876.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Legislation referred to

Rules of Court 2012 O 14, O18 rr 19(1)(b), (1)(c), (1)(d)

Appeal from: Civil Suit No 22NCVC-37–10 of 2013 (High Court, Temerloh)

KM Chan (JH Chai with him) (Nor Shahid Abd Malik & Assoc) for the appellant.
Harmesh Singh (Norliza, Sheela, Param & Co) for the respondent.

Abdul Aziz Abdul Rahim JCA (delivering judgment of the court):

[1] On 22 December 2014 the learned judicial commissioner ('JC') of the High Court at Temerloh, Pahang dismissed the plaintiff's ('the appellant herein') application to strike out the defendant's ('the respondent herein') statement of defence pursuant to O 18 r 19(1)(b), (c) and (d) of the Rules of Court 2012 ('the ROC 2012') and refused the plaintiff's application to enter summary judgment against the plaintiff's application under O 14 of the ROC 2012.

[2] The plaintiff grounded his application principally on the ground of res judicata. The defendant had filed OS No 24NCC-407–11 of 2012 ('OS 407') at Kuala Lumpur High Court against the defendant in 2012. OS 407 was disposed of in favour of the plaintiff on 21 February 2013 and the High Court decision was affirmed by this court (comprising of different panel) on 29 July 2013. The plaintiff contended that in the present suit the defendant is relitigating the same issues as in the OS 407. This was denied by the defendant.

A BACKGROUND FACTS

[3] In the present suit the plaintiff is suing the defendant, inter alia, for specific performance of Vectorwood share sale agreement dated 12 September 2011 for the sale of 55% shares in a company called Vectorwood Sdn Bhd ('VW') at a consideration price of RM9m.

[4] The story of the sale and purchase of the shares goes back to 21 June 2011 when the defendant agreed to sell to the plaintiff 55% shares in a company known as Mentakab Veneer & Plywood Sdn Bhd ('MVP') under a temporary agreement of the same date for a consideration of RM9m. At the material time the defendant was not the registered shareholder of MVP. However the plaintiff contended that it was common ground that both contracting parties acknowledged that the temporary agreement was intended to refer to the sale of shares in VW.

[5] On 12 September 2011 the plaintiff and defendant subsequently signed a more detailed agreement where the defendant agreed to sell and the plaintiff agreed to purchase 55% of the equity interest in VW for a consideration of RM9m.

[6] The defendant executed the transfer forms for the transfer of the VM shares in favour of the plaintiff or plaintiff's nominee. It is not disputed that the plaintiff had paid RM7m to the defendant. The payments were made by six Public Bank Bhd cheques between 21 June 2011 and 15 March 2012. The final payment of RM2m was deposited with Messrs Abdul Malik & Lawrence Tan ('the solicitors') as stakeholders.

[7] In 2012 the defendant filed OS 407 against the plaintiff for the following orders:

(a) specific declarations of rescission of part of the said share sale under the temporary agreement as well as declarations of ownership of the VW shares as a result thereof; and

(b) an injunction to restrain the transfer of the two million shares to the plaintiff or nominee or declaration of nullity in respect of the transfers.

[8] In OS 407 the defendant premised his claim on two grounds: (i) the plaintiff has breached the temporary agreement in failing to pay the final sum of RM2m for the purchase of the VM shares; and (ii) since the plaintiff has paid only the sum of RM7m, the plaintiff is entitled to only 42.77 % of the paid up capital of the third defendant (ie VW Sdn Bhd).

[9] OS 402 was disposed of by the KL High Court in favour of the appellant/plaintiff herein. The respondent/defendant herein appealed against the decision to the Court of Appeal but the appeal was dismissed (see *Perintah Mahkamah Rayuan* dated 29 July 2013 at pp 193–194 *RR Jld* 1).

[10] In his defence to the present suit by the plaintiff and in his counterclaim against the plaintiff, the defendant seeks, inter alia, the following orders:

(a) a declaration that the plaintiff has breached the temporary agreement and the VW share sale agreement;

(b) a declaration that both the aforesaid agreements be terminated;

(c) an order for the defendant to return all the monies RM7m paid by the plaintiff; and

(d) an order for the plaintiff to deliver all the VW and MVP shares back to the defendant.

[11] Subsequently, the plaintiff filed an application to strike out the defendant's defence and counterclaim on the ground of res judicata. However the plaintiff's application was dismissed by the learned JC; hence this appeal before us.

[12] In dismissing the plaintiff's application, the learned JC wrote in judgment as follows:

> [16] Dalam kes ini pembelaan dan tuntutan balas defendan berdasarkan kegagalan plaintif yang dikatakan mungkir perjanjian penjualan tersebut apabila plaintif gagal, enggan dan/atau cuai menunaikan permintaan defendan untuk mendapatkan jumlah RM2 juta dari *stakeholder* yang sepatutnya dibayar kepada defendan.
>
> [17] Isu yang telah diputuskan oleh mahkamah dalam kes Mahkamah Kuala Lumpur hanya menyentuh tentang bahawa perjanjian penjualan saham adalah perjanjian muktamad daripada perjanjian sementara dan memutuskan bahawa wang RM2 juta telah didepositkan kepada stakeholder. Keputusan ini tidak menyentuh atau berkisar kepada isu samada plaintif telah mungkir terma-terma perjanjian kerana gagal memberi wang tersebut kepada defendan. Oleh itu pembelaan defendan ini bukan satu yang bersifat res judicata.
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> [18] Defendan juga membangkitkan pembelaan bahawa beliau telah di estop daripada menjalankan tanggungjawab beliau di bawah perjanjian penjualan saham tersebut disebabkan tingkah laku atau tindakan selepas keputusan kes Mahkamah Kuala Lumpur dengan memecat defendan sebagai pengarah kedua-dua syarikat tersebut. Perkara ini belum pernah atau tidak pernah diputuskan oleh mahkamah dalam kes Mahkamah Kuala Lumpur tersebut. Oleh itu ia bukan bersifat res judicata.
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> [19] Tuntutan plaintif adalah bagi satu pelaksanaan spesifik supaya defendan memenuhi tanggungjawab dan obligasinya dalam perjanjian. Oleh itu pembelaan

A plaintif mengenai kemungkiran dan tingkah laku plaintif yang menyebabkan perjanjian penjualan tidak dapat dilaksanakan serta tuntutan defendan bagi menguatkuasakan haknya merupakan satu persoalan yang serius yang harus dibicarakan dan bukan satu yang remeh dan menyusahkan atau menyalahgunakan proses mahkamah.

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[13] It is obvious from the above passages the learned JC had taken a narrow approach to the issue raised by confining himself only to allegation that the High Court in OS 407 had only decided that the share sale agreement was final and had superseded the temporary agreement and that the plaintiff had C deposited the final payment of RM2m with the stakeholder. The learned JC further held that the decision did not touch on the issue whether the plaintiff had breached the terms of the agreement in failing to pay the money to the defendant. Therefore, it is not res judicata. The learned JC also held that the issue that the defendant was estopped by the plaintiff from carrying out his D duties as director of the company by removing the defendant as director (after the High Court decision in OS 407) was never decided by the High Court in the OS 407.

[14] We observe that the learned JC had arrived at the above finding and E conclusion without any critical analysis of the defendant's defence and the reasoning and findings of the High Court in OS 407. To fully appreciate the issue on res judicata it is necessary to understand what the application of the defendant herein in OS 407 as understood by the High Court then. For that purpose we reproduce the relevant paragraphs of the learned judge's judgment F in OS 407. There are as follows:

(11) Plaintif memohon mahkamah membuat deklarasi bahawa perjanjian sementara telah dimungkiri oleh defendan pertama dan meminta supaya mahkamah membuat deklarasi bahawa perjanjian sementara dibatalkan setakat harga belian yang belum dibayar sebanyak RM2 juta dan defendan pertama hanya G pemegang 42.77% dan bukan 55% saham dalam defendan ketiga dan perintah berbangkit yang lain. Secara terperinci permohonan plaintif adalah seperti berikut:

(a) suatu deklarasi bahawa defendan pertama telah memungkiri perjanjian sementara yang dimasuki antara plaintif dan defendan pertama pada 21 Jun 2011 untuk jualan 55% daripada pegangan saham plaintif dalam defendan H ketiga kepada defendan pertama untuk balasan keseluruhan sebanyak RM9 juta ('perjanjian sementara').

(b) suatu deklarasi bahawa:

(i) perjanjian sementara tersebut dibatalkan dalam bahagian dan I setakat baki harga belian yang belum dijelas sebanyak RM2 juta yang masih belum dibayar oleh defendan pertama menurut perjanjian sementara setakat tarikh permulaan prosiding ini;

(ii) bahawa akibat daripada kemungkiran defendan pertama di bawah Perjanjian Sementara, defendan pertama bukannya pemegang

saham 55% dalam defendan ketiga; dan

(iii) bahawa akibat daripada kemungkiran defendan pertama di bawah perjanjian sementara, defendan pertama hanya pemegang saham 42.77% dalam defendan ketiga.

Injunksi

(c) bahawa defendan-defendan dihalang, sama ada melalui diri sendirinya atau pekerja-pekerja atau ejen-ejen atau sebaliknya daripada melaksanakan pemindahan 2 juta saham-saham dalam defendan ketiga kepada defendan pertama, DUSB atau mana-mana pihak melalui borang 32A yang ditandatangani oleh plaintif;

Pemindahan Saham Tidak Sah

(d) secara alternatif, di mana defendan pertama telah melaksanakan pemindahan 2 juta saham kepada defendan pertama, DUSB atau mana-mana pihak ketiga, suatu deklarasi bawah (?) pemindahan tersebut adalah tidak berkesan, terbatal dan tidak sah.

Membatalkan Daftar Saham

(e) suatu perintah dan deklarasi bahawa daftar saham defendan ketiga diperbetulkan untuk memaparkan defendan pertama sebagai pemegang saham 42.77%, plaintif sebagai pemegang saham 51.51% dan Mohd Yusof bin Mohd Ali sebagai pemegang saham 5.72%;

[15] On the above prayers and the submission of counsel for the plaintiff (the defendant/respondent herein) in OS 407, the learned judge listed the issues for determination as follows:

(16) Dalam hujahan bertulisnya peguam plaintif menyenaraikan cadangan-cadangan isu yang patut dibicarakan seperti berikut:

(a) sama ada defendan pertama telah memungkiri perjanjian sementera apabila gagal membayar baki harga belian sebanyak RM2 juta;

(b) sama ada pindah milik kepada nominee defendan pertama iaitu DUSB dan telah didaftarkan adalah tidak sah dan terbatal kerana tiada balasan;

(c) sama ada plaintif berhak mendapat rektifikasi untuk mengembalikan daftar pemilikan saham dalam defendan ketiga ke atas namanya;

(d) sama ada perjanjian penjualan saham VW adalah ditamatkan secara bersama oleh plaintif dan defendan secara lisan;

(e) sekiranya perjanjian penjualan saham VW tidak ditamatkan dengan sahnya sama ada defendan pertama telah melaksanakan segala kewajipannya dalam perjanjian penjualan saham VW;

(f) sekiranya perjanjian penjualan saham VW tidak ditamatkan dengan sahnya adakah perlu plaintif meletak jawatan sebagai pengarah;

(g) sama ada mahkamah wajar membenarkan injunksi menghalang rekuisisi untuk EGM defendan kedua oleh Hsu Ching Hsiang dan Hsu Lin Chu untuk mengeluarkan plaintif sebagai pengarah defendan kedua dan melantik adik defendan pertama sebagai pengarah defendan kedua; dan

(h) sama ada mahkamah wajar membenarkan injunksi menghalang EGM defendan ketiga berasaskan rekuisisi yang dikeluarkan oleh defendan pertama dan DUSB.

[16] Given the above facts, the High Court in OS 407 held as follows:

> (29) Dalam kes di hadapan mahkamah ini, defendan pertama mahu dan mampu membayar dan telah mendepositkan baki harga jualan RM2 juta tersebut kepada peguam defendan pertama sebagai stakeholder dan di pihak plaintif hendaklah menyerahkan surat perletakan jawatan sebagai pengarah seperti yang telah dipersetujui dalam perjanjian penjualan saham VW. Bayaran yang didepositkan dengan *stakeholder* boleh dituntut oleh plaintif bila-bila masa apabila semua kewajipan dilaksanakan berdasarkan perjanjian.

[17] And at para 31 of the same judgment the High Court held, with respect to the transfer of the two million VM shares to the defendant (the appellant/plaintiff herein) as follows:

> (31) Terdapat keterangan melalui eksibit LEY-4 bahawa pindah milik 750,000 saham kepada defendan pertama pada 23 Ogos 2011 dan pindahmilik 2 juta saham kepada nominee defendan pertama pada 19 December 2011 telahpun diluluskan oleh resolusi pengarah yang dihadiri oleh plaintif sendiri sebagai salah seorang pengarah. Ini adalah berdasarkan fasal 6.1 perjanjian penjualan saham VW ...

[18] In the instant case under appeal, the respondent/defendant had also pleaded at para 10 of the statement of defence that the appellant/plaintiff had failed to pay the balance of the purchase price to the respondent/defendant. As can be seen above, this fact or issue was dealt with by the High Court in OS 407 whereby the court found that the appellant/plaintiff had deposited the final payment of RM2m to stakeholder which the respondent/defendant can claim anytime after he had transferred the shares to the appellant/plaintiff.

[19] In paras 11 and 12 of the statement of defence in the instant case, the respondent/defendant also pleaded the fact as to the transfer of the shares by the appellant/plaintiff to his nominee and the fact that after the transfer the respondent/defendant was removed as director respectively. It can be seen from the above passages reproduced from the judgment of the High Court in OS 407 that these two matters had also been decided by the court in that case. Moreover we observe that the transfer of the shares and the removal of the respondent/defendant as director was in 2011. The OS 407 was filed in 2012. These had been raised as we noted above; but even if there were not, the issues could have been raised then.

[20] The then Supreme Court held in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, that 'when a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata, as the judgment becomes the truth between such parties. An estoppel per rem judicatum has been created as a result'. The same court also held that 'there are two kinds of estoppel per rem judicatum, ie cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment between the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently'.

[21] That case also is an authority for the proposition that the court has inherent jurisdiction to dismiss an action by applying the doctrine of res judicata, which is an estoppel based on public policy. This is so even if it has not been pleaded as public policy requires that there should be finality in litigation.

[22] In *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57, this court speaking through the judgment of Gopal Sri Ram JCA (as he then was) said that 'once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened' and 'a failure to adhere to the principle of res judicata may lead to chaos in the conduct of civil proceedings'.

[23] From the pleadings in the statement of defence in this instant appeal and when compared to issues dealt with by the High Court in OS 407, it is crystal clear that the same issues were litigated and decided in that suit. Therefore we are of the view that the appellant/plaintiff in this appeal should succeed in their argument on the principle of res judicata.

[24] Accordingly, we allowed the appeal with costs of RM30,000 here and below and we also allowed the appellant/plaintiff's application for summary judgment in respect of prayer (a) and (b) only. Finally we ordered that the High Court order 22 December 2014 be set aside.

A *Appeal allowed, decisions of the High Court set aside and appellant's application for summary judgment allowed in respect of prayers (a) and (b).*

Reported by Ashok Kumar

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